United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7507

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Plaintiff-Appellant
v. 75-7507
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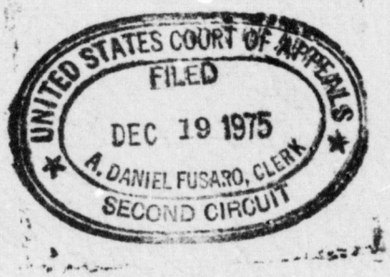
HOLMDEL CORP.

BRIEF OF APPELLANT ...



IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROBERT CUTMORE,	)	Docket No. 75-7507
	)	
Plaintiff-Appellant	)	
	)	
vs.	)	
	)	
PLAZA INVESTORS HOLMDEL CORPORATION AND HAROLD LEWIS,	)	
	)	
	)	
Defendant-Appellees	)	December 15, 1975

APPEAL FROM DISTRICT COURT

BRIEF OF APPELLANT

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TABLE OF CONTENTS

INDEX TO CITATIONS

STATUTES CITED

STATEMENT OF ISSUES

I. DID THE DISTRICT COURT ERR IN FINDING THAT THE DEFENDANT HAROLD LEWIS WAS LIABLE IN NEGLIGENCE AS THE OWNER AND CONTROLLER OF THE PREMISES FOR FAILING TO PROVIDE THE PLAINTIFF A SAFE PLACE TO WORK?

II. DID THE DISTRICT COURT ERR IN PIERCING THE CORPORATE VEIL AND RULING THAT DEFENDANT LEWIS, ALTHOUGH LIABLE IN NEGLIGENCE ON THE FACTS, WAS EXCUSED FROM LIABILITY IN LAW AS THE REAL PRINCIPAL EMPLOYER OF THE PLAINTIFF?

STATEMENT OF THE CASE

The facts are as stated in the District Court's Memorandum and Order, (App., 9) and are undisputed. Plaintiff Cutmore, a carpenter brought this action against Plaza Investors Holmdel Corp. (Holmdel) and Harold Lewis, an individual.

The accident which forms the basis of the claim occurred March 15, 1972 while plaintiff was employed by Engineered Systems Corp. (Engineered). Plaintiff was working in one store of the Copps Hill Plaza Shopping Center being built in Ridgefield, Connecticut. Plaintiff was working on a scaffold some distance above a concrete floor and was in the process of doing preliminary work for the installation of a suspended ceiling in that store which was later to be occuped by W.T. Grant.

While propelling himself on the scaffold over the concrete floor toward another work location, the plaintiff was caused to fall to the floor ten (10) feet below. The fall was caused by the scaffold's tipping as one of the wheels of the scaffold fell into an uncovered hole in the concrete floor. The plaintiff alleged negligence in permitting these holes to exist and to remain open and unprotected when the defendants knew of their unprotected condition and that workmen were working on rolling scaffolds in the area, Complaint, Para. 11 (App., 4)

The corporate defendant Holmdel acquired the land on which the shopping center was to be built on December 16, 1969 and leased structures to be built thereon to various commercial enterprises. The store in which claimant's fall occurred was leased by Holmdel to W.T. Grant in 1970. On December 16, 1971, the corporate defendant Holmdel conveyed the shopping center land to the individual defendant Harold Lewis, Memorandum and Order (App., 10)

The individual defendant Lewis was President and sole stockholder of Plaza Investors Corp. (Investors) and also of Holmdel. He thus controlled both corporations. Investors was a construction corporation and Holmdel was the shopping center development corporation.

Holmdel contracted by oral agreement with Investors to construct the shopping center. The "oral agreement would appear to have been an agreement with himself but in different presidential capacities," Memorandum and Order, (App.,2)

Investors, the construction corporation then sub-contracted the ceiling work in the W.T. Grant store to Engineered. The plaintiff Cutmore was thus an employee of a sub-contractor on a job for which Investors was the general contractor. Plaintiff's assertion of liability against Lewis and Holmdel is stated in paragraphs 4 and 11 of the Complaint (App.,2, 4). Paragraph 4 alleges that plaintiff was performing his work on property owned and controlled by the two defendants. Paragraph 11, as previously noted, states the defendants were negligent with respect to the open unprotected

holes in the concrete floor of the W.T. Grant structure.

The District Court found that plaintiff's allegation of ownership and control by these two defendants and plaintiff's theory of negligence liability on the part of defendant Harold Lewis, at least, were consistent with the undisputed facts adduced in evidence.

> "There is no question but that Lewis and Investors were under a legal obligation to provide plaintiff with a safe place in which to work. As events proved, they did not." (Memorandum and Order) (App.,15)

However, the Court then went on to render judgment for the defendant on the basis of the Connecticut Workmen's Compensation Act, the "principal employer" statute, Sec. 31-291, Conn. Gen. Statutes. The Court held that although Investors, not a named party to the action at all, was actually the general contractor and the principal employer, nonetheless Harold Lewis, the individual defendant, was so totally in control of Investors that he was in reality general contractor and principal employer. Since Lewis was thus held to be the principal employer, the plaintiff's sole recovery could only be in workmen's compensation and not in negligence.

ARGUMENT

I. DID THE DISTRICT COURT ERR IN FINDING THAT THE DEFENDANT HAROLD LEWIS WAS LIABLE IN NEGLIGENCE AS THE OWNER AND CONTROLLER OF THE PREMISES FOR FAILING TO PROVIDE THE PLAINTIFF A SAFE PLACE TO WORK?

Ordinarily, the plaintiff in a negligence case would be content to leave undisturbed a Court's conclusion that defendant was liable in negligence for failing to provide the plaintiff safe place to work. And of course, the plaintiff is not here arguing with that conclusion. The simple answer to the question above posed is that the district court did not err in its conslusory statement about defendant Lewis' liability in negligence.

But we are forced to exami e that conclusion because of the analysis employed by the Court in getting there. To start with, the Court correctly found the undisputed fact that on March 15, 1972, the date of the injuries claimed, the defendant Harold Lewis was the owner of the shopping center premises.

Ordinarily, an owner of premises has control of those premises. However, Connecticut tort law holds

> "that where the owner of premises employs an independent contractor to perform work upon them,...the contractor and not the owner is liable for any losses resulting from negligence in the performance of the work until... it has completed, turned over and accepted by the owner..." TRAINOR v. FRANK MERCEDE & SONS, INC., 152 Conn. 364, 368 (1964).

Under the circumstances of the instant case, the general contractor was Plaza Investors Corp., a corporate entity having an independent legal existence and identity different from Harold Lewis, its president and sole stockholder. "That a 'one man' corporation is a valid jural person was decided by the House of Lords in 1897, and has not been doubted ever since." UNITED STATES v. WEISSMAN, 219 F2d. 837, 838, (2d Cir.) (L. Hand, J.) At first blush then, it would seem that control of the shopping center premises was in Investors, the general contractor on the construction and not a defendant in this action.

But in that same TRAINOR case, the Connecticut Supreme Court overruled a directed verdict absolving the owner of the premises from liability and set aside a jury verdict against the independent general contractor. In setting aside the verdict against the contractor, the Connecticut court agreed with the general rule of contractor control of premises during construction, but it stated an even more basic premise of the common law that the assumption of contractor control was refutable if in a specific case the facts showed or tended to show control still remained in the land owner. In such a case, it was not a matter of law but one of fact for the jury to decide.

The TRAINOR case was further explicated and analyzed by the state's Appellate Court in WRIGHT v. COE & ANDERSON, INC., 156 Conn. 145 (1968).

There the sub-contractor attempted to rely on the same general rule at page 150 and 151 of the opinion. The sub-contractor argued that under the rule, the general contractor and not the sub-contractor had control of the premises. But the Court again held as in TRAINOR that where the facts in a particular case put in question the general contractor exclusive control rule, then it became a matter for the jury to decide who had actual control.

In the instant case, the district court at pages 6 and 7 of its Memorandum (App.,14-15) addresses itself to the proposition of contractor control of premises.

> "...the contractor--not the ower--is liable in tort until the building has been turned over to the owner. In this case, Lewis as the contractor, would turn the building over to himself as owner. Any such corporate veil in which he sought to enshroud himself to avoid liability, would be so diaphanous as to be easily pierced." (App.,7)

The plaintiff never asked the trial court to perform this surgical penetration of the "diaphonous"...corporate veil. Nor did the trier cite any Connecticut common law precedents for this piercing.

All that we had asked the trial court to do was to apply the reasoning of the TRAINOR and WRIGHT cases. We had argued that the individual defendant Lewis as president of the corporation Investors had in fact control of the premises and knew of the defects in the premises. We had then argued that he could not in his guise of individual land owner divest himself of the scienter and control acquired in his corporate

capacity as president of the contractor corporation Investors.

He may have acquired control and knowledge of the defective premises in his corporate capacity, but that control and knowledge remained with him as individual land owner and obligated him to repair the defect or at least to protect the employees of the sub-contractor from the results of the defect. This was our limited assertion to the district court squarely within the confines of Connecticut precedent, i.e. that the peculiar factural circumstances of this case were an exception to the contractor control rule and caused control of the premises to be retained by the individual land owner.

Owner control of the premises could have been established by the district court within the parameters of the TRAINOR and WRIGHT precedents without doing such violence to two centuries of Connecticut precedent favoring the establishment of corporate entities. Chief Justice Maltbie of the Connecticut Supreme Court in 1932 commented that our courts are permitted to disregard the corporate legal fiction only when the corporate device is being used to evade a statute or accomplish some illegal or fraudulent purpose, HOFFMAN v. WALLPAPER CO., INC. v. HARTFORD, 114 Conn. 531, 535. The Chief Justice then continues still at page 535 of the opinion,

> "Unless something of this nature is established, to refuse to recognize the corporate entity as such is, in the words of Chief Judge Cardozo, to 'thwart the public policy of the State instead of defending and upholding it." BERKEY v. THIRD AVENUE RY. CO., 244 N.Y. 84, 95, 155 N.E. 58.

To conclude Point I of our argument, the District Court did not err in holding that the defendant Lewis could be liable in negligence; but the reason Lewis is liable in negligence is because the peculiar circumstances of this case caused him to retain control of the premises as landowner and not because the corporate veil needed to be pierced.

II. DID THE DISTRICT COURT ERR IN PIERCING THE CORPORATE VEIL AND RULING THAT DEFENDANT LEWIS, ALTHOUGH LIABLE IN NEGLIGENCE ON THE FACTS, WAS EXCUSED FROM LIABILITY IN LAW AS THE REAL PRINCIPAL EMPLOYER OF THE PLAINTIFF?

This portion of the argument has to do with Section 31-291 of the Conn. Gen. Statutes. That section states:

> "When any principal employer procures any work to be done wholly or in part for him or by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business of such principal employer, and is performed in, on or about premises under his control, such principal employer shall be liable to pay all compensation under this chapter to the same extent as if work were done without the intervention of such contractor or subcontractor."

Many Connecticut cases have analyzed this section of Workmen's Compensation Act and have held:

> "In order to come within the provisions of this statute, three things must be shown:
> (1) the relation of principal employer and contractor must exist in work wholly or in part for the former;
> (2) the work must be on or about premises controlled by the principal employer;
> (3) the work must be a part or process in the trade or business of the principal employer."
> KING v. PALMER, 129 Conn. 636, 640 (1943)

In the instant case, the contractor referred to in the statute would be Investors. Circuit Judge Moore in his Memorandum at page 5 states:

> "Were investors a defendant there would be no doubt that under section 31-291 it would be a principal employer and protected by the statute--but it is not. Undoubtedly to by-pass the statute plaintiff elected not to sue Investors." (App., 13)

After making these comments, then the Trial Judge proceeds to pierce the corporate veil, as we have noted in Point I, and concludes that since Lewis and Holmdel and Investors are all one entity, he was going to treat Lewis as the principal employer anyway and rule section 31-291 applicable to bar recovery just as if the plaintiff had sued Investors, the general contractor and principal employer.

On pages 8 and 9 of his Memorandum, (App., 16-17) the Trial Judge implies that had the plaintiff's immediate employer, the sub-contractor (Engineered) not provided workmen's compensation benefits, then the defendant Lewis under section 31-291 would have had to provide them. No evidence at all was presented at the trial on this issue, so this was a factual and legal conclusion based on pure speculation.

But if the trier wanted to engage in such speculation, on what basis did he conclude that Investors would not provide workmen's compensation benefits had Engineered failed to provide them to plaintiff? After all, Investors was the legally liable entity under 31-291 should Engineered have

defaulted in its obligation.

There was no evidence whatsoever that Plaza Investors Corp. was an insolvent corporation unable to meet all its legal obligations, that it was a mere shell with no assets. The fact that it was a corporate entity entirely controlled by Harold Lewis did not make it a bankrupt entity. No one has here been heard to argue or produce evidence to show that Harold Lewis created Plaza Investors Corp. for some fraudulent or illegal purpose in order to deprive employees of Investors' sub-contractors of their legitimate rights under the Connecticut Workmen's Compensation Act. Only if this were proven to be the case, would it then be necessary to ask the courts to pierce the corporate veil and reach this individual malefactor of great wealth to make him personally pay workmen's compensation benefits to the employees of Investors' sub-contractors.

ZAIST v. OLSON, 154 Conn. 563 (1967) is the most recent Connecticut case we have found in which the courts pierced the corporate veil. There, the Connecticut Supreme Court found that the individual defendant Olson had created one man corporations "to perpetrate an unjust act in contravention of plaintiffs' rights." v.n., 578.

Olson had created a corporation and deliberately left it with no assets so that the plaintiffs sub-contractors were left with bills for services unpaid. Because of this proven essentially fraudulent pattern of conduct, supported by much evidence in the record before the referee, the Supreme

Court forced the individual defendant to pay debts contracted in the name of the corporate defendant. Even at that, the ZAIST case was the occasion for vigorous dissents, and the opinion was uttered only by a 3-2 majority of the court.

The Connecticut line of decisions on piercing the corporate veil clearly holds as already cited in Point I of our Argument that such disregard by the Courts of the corporate legal fiction can only occur when there has been a fraudulent abuse of privilege by the incorporators. To this effect are HOFFMAN WALL PAPER CO., INC. v. HARTFORD, 114 Conn. 531 (1932); HUMPHREY v. ARGRAVES, 145 Conn. 350 (1958); KULUKUNDIS v. DEAN STORES HOLDING CO., INC., 132 Conn. 685 (1946).

Clearly, in the instant case there is absolutely no allegation of fraud, never mind evidence of the same. The allegations of the complaint simply show that Harold Lewis created two "one man" corporations, valid jural persons separate from himself and from each other. One was Holmdel, the real estate development corporation. The other was Investors, the construction corporation. Holmdel purchased the Copps Hill Plaza Shopping Center land in Ridgefield and leased space in stores to be erected thereon.

Holmdel, and/or Lewis, contracted with Investors to build a shopping center. Then Holmdel conveyed the site to Lewis. There was no fraudulent purpose or unjust enrichment asserted or proved in any of these transactions, so no occasion arises under Connecticut law to pierce the corporate veil in

favor of defrauded workmen, creditors or investors.

Instead, the legal claim here being asserted is against the individual landowner, because he retained sufficient control over the premises in his individual capacity. The plaintiff is not suing the corporation and asking the individual to pay the debts of his corporation. We are not asking the courts to set aside the legal device of limited liability for corporate obligation.

We are suing the individual and are denying that corporate defenses may be asserted in the individual's name. It is the court which on its own motion pierces the corporate veil not to hold the sole stockholder and executive officer of the corporation liable for some corporate obligation to a third party, but rather to deny to that third party the right to enforce his obligation against the individual himself.

This has to be a novel juridical concept. Lewis employed the law for perfectly legal objectives. He limited his indivudal liability during the acquisition and development phase by using Holmdel, the development corporation. He then again limited his individual liability by using Investors as the building corporation. All this was perfectly legal and above board. These corporations apparently met theie obligations.

Then, when a certain stage in construction was reached, probably when most of the outer shells of the proposed structures were erected, Lewis decided it would be advantageous for him to own the land in his own name. Presumably, in December, 1971, after Holmdel had owned the site for two years,

there was some capital gain or other advantage which Lewis sought by acquiring title in his own name.

But then, three months later, an accident occurred; and the victim sued the landowner. Then, Lewis, who up until this time had presumably profited, and legitimately so, from the corporate legal fiction, prevails on the court to set aside these fictions so he, Lewis, can assert Investors' legal defense as the principal employer under the Workmen's Compensation Act. Is not that permitting the defendant in the inelegance of the vernacular "to have his cake and eat it, too?"

SUMMARY

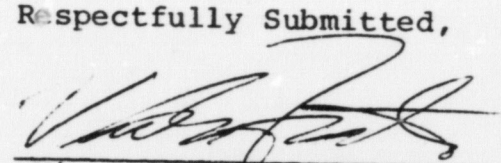
The defendant Harold Lewis was not the general contractor and principal employer on the construction site. He was the landowner as was United Illuminating in GIGLIOTTI v. UNITED ILLUMINATING CO., 151 Conn. 114 (1963). Lewis chose not to be the general contractor. He employed the corporate entity Investors for that purpose. Therefore, none of the conditions precedent for the application of section 31-291 set down in KING v. PALMER, v.s., apply

To pierce the corporate veil in order to force section 31-291 to apply does violence to Connecticut corporation and tort law and is not permissible on the facts of this case, because no fraud or illegal purpose on the part of the individual defendant Lewis has been alleged or proved.

For these reasons, the plaintiff respectfully requests that this Court set aside the judgment of the Court

below and direct a verdict for the plaintiff on the question of liability and further to remand the matter to the district court for a determination of damages.

Respectfully Submitted,



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